Filed 6/30/09 In re Haro CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re ONESIMO MARIN HARO, on Habeas Corpus.	H033663 (Santa Clara County Super. Ct. No. 134834)

In 1989, Onesimo Haro (Haro), a California state prison inmate, shot and killed his wife. Following a court trial, he was found guilty and sentenced to an indeterminate term of 17 years to life in state prison. His minimum eligible parole date was December 23, 2000, over eight years ago. Appellant, James D. Hartley, the warden of Avenal State Prison where Haro is incarcerated, appeals from an order of the Santa Clara County Superior Court granting habeas relief to Haro.[1] With modifications, we affirm the order of the superior court.

Background

Following his third denial of parole, Haro filed a petition for writ of habeas corpus in Santa Clara County Superior Court on July 7, 2008. On July 31, 2008, the superior court issued an order to show cause (OSC) directing the Board to file a return. In responding to the OSC, the court ordered the Board to "outline what motives for murder

[1] Generally, although a habeas petition is "directed to the person having custody of or restraining the person on whose behalf the application is made" (Pen. Code, § 1477), Haro challenged the actions of the Board of Parole Hearings. Accordingly, we refer to appellant as the Board.

could not be found 'trivial' by the Board" and indicated that a "[f]ailure to do so will be accepted as a concession that the Board uses unsuitability criteria with no meaning."

On October 2, 2008, the Board filed a return in which the Board argued that its February 2008 decision denying Haro parole satisfied Haro's due process rights because it was supported by "some evidence" that Haro currently remains an unreasonable threat to public safety.

On October 31, 2008, Haro filed a traverse in which he asserted that the Board set forth no evidence demonstrating that his parole currently posed an unreasonable risk of danger to public safety.

On November 24, 2008, the superior court granted Haro's petition for writ of habeas corpus. The court found that the Board's decision was the product of a "formulaic approach" in which the Board recites the historical facts of the crime and notes "other pros and cons" without articulating an explicit nexus between the negative factors and current dangerousness as required under *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*). The court went on to say that the Board "is required to have a meaning and framework within which it operates." Since, according to the court, the Board had not utilized the *Lawrence* " 'nexus' standard and because this is what due process requires," the court ordered the Board to provide Haro a new hearing within 35 days.

The Board filed a notice of appeal on December 15, 2008. On application of the Board by petition for writ of supersedeas, this court granted a stay of the superior court's order on December 22, 2008.

The Board's Regulatory Scheme and this Court's Scope of Review

Penal Code section 3041, subdivision (a) states that the Board, prior to the inmate's minimum eligible parole release date shall meet with the inmate and "shall normally set a parole release date . . . ." California Code of Regulations, title 15, section 2402, subdivision (b) sets forth the manner in which an inmate's suitability for parole is

to be determined by the Board. Section 2402, subdivision (a)[2] states that "[r]egardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison."

Section 2402, subdivision (c) identifies six nonexclusive circumstances *tending to show unsuitability*, the relative importance of which "is left to the judgment of the panel." One of the specified circumstances is "(1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner."[3]

Factors that support a finding that the prisoner committed the offense in an especially heinous, atrocious, or cruel manner include the following: "(A) Multiple victims were attacked, injured, or killed in the same or separate incidents; [¶] (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; [¶] (C) The victim was abused, defiled, or mutilated during or after the offense; [¶] (D) The offense was carried out in a manner that demonstrates an exceptionally callous disregard for human suffering; [¶] (E) The motive for the crime is inexplicable or very trivial in relation to the offense." (§ 2402, subd. (c)(1).)

In *In re Rosenkrantz* (2002) 29 Cal.4th 616, 658 (*Rosenkrantz*), our Supreme Court held that "the judicial branch is authorized to review the factual basis of a decision of the Board denying parole in order to ensure that the decision comports with the

---

[2] Unless noted, all undesignated regulation and section references are to Title 15 of the California Code of Regulations.

[3] The remaining circumstances are "(2) Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age. [¶] (3) Unstable Social History. The prisoner has a history of unstable or tumultuous relationships with others. [¶] (4) Sadistic Sexual Offenses. The prisoner has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim. [¶] (5) Psychological Factors. The prisoner has a lengthy history of severe mental problems related to the offense. [¶] (6) Institutional Behavior. The prisoner has engaged in serious misconduct in prison or jail." (§ 2402, subd. (c).)

requirements of due process of law, but . . . in conducting such a review, the court may inquire only whether *some evidence* in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation. If the decision's consideration of the specified factors is not supported by *some evidence* in the record and thus is devoid of a factual basis, the court should grant the prisoner's petition for writ of habeas corpus and should order the Board to vacate its decision denying parole and thereafter to proceed in accordance with due process of law." (Italics added.)

Before its opinions in *Lawrence*, *supra*, 44 Cal.4th 1181, and *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*), the California Supreme Court had held that this " 'some evidence' standard is extremely deferential." (*Rosenkrantz*, *supra*, 29 Cal.4th at p. 665.) "Only a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the Governor [or Board]. . . . [T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor [or Board], but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious. It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the [Board]'s decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's [or Board's] decision." (*Id.* at p. 677.)

In *Lawrence* and *Shaputis*, the court clarified, but did not overrule, this scope of review.

In *Lawrence*, the inmate's commitment offense was a result of her having an affair with a dentist. The dentist ended the affair and told the inmate that he was staying with

his wife. Armed with a gun and potato peeler, the inmate confronted the dentist's wife, shot her, and repeatedly stabbed her with the potato peeler. The inmate fled and remained a fugitive for 11 years. After turning herself in and being sentenced to life in prison, the inmate became an exemplary prisoner, had no discipline violations, took numerous self-help classes, and had positive psychological examinations. The Board granted her parole three times, but the Governor reversed the decision each time. In 2005, the Board granted parole for the fourth time, and the Governor again reversed the decision. The Governor found that the inmate (1) remained an unreasonable safety risk due to the callous nature of the commitment offense, (2) had had some negative psychological evaluations when she was first incarcerated, and (3) had been counseled regarding discipline problems while in prison. The Court of Appeal reversed the Governor's decision, finding that the Board had properly determined that defendant was suitable for parole. The Supreme Court granted review to resolve the dispute that had arisen in several appellate court cases as to the appropriate scope of review. (*Lawrence, supra,* 44 Cal.4th at pp. 1190-1192.)

Before *Lawrence*, some cases had interpreted *Rosenkrantz* to require that a parole denial must be upheld if "some evidence" supported one of the circumstances tending to establish unsuitability for parole such as that the commitment offense was particularly egregious. (See *In re Bettencourt* (2007) 156 Cal.App.4th 780, 800; *In re Andrade* (2006) 141 Cal.App.4th 807, 819; *In re Burns* (2006) 136 Cal.App.4th 1318, 1327-1328.) Other cases had interpreted *Rosenkrantz* to require that "some evidence" supported the ultimate determination that the inmate remained a current threat to public safety. (See *In re Lee* (2006) 143 Cal.App.4th 1400, 1409; *In re Scott* (2005) 133 Cal.App.4th 573, 595; *In re Elkins* (2006) 144 Cal.App.4th 475, 499.)

In *Lawrence*, the Supreme Court reasoned that "[i]f we are to give meaning to the statute's directive that the Board *shall normally* set a parole release date ([Pen. Code,] §

3041, subd. (a)), a reviewing court's inquiry must extend beyond searching the record for some evidence that the commitment offense was particularly egregious and for a mere *acknowledgment* by the Board or the Governor that evidence favoring suitability exists. Instead, under the statute and the governing regulations, the circumstances of the commitment offense (or any of the other factors related to unsuitability) establish unsuitability if, and only if, those circumstances are probative to the determination that a prisoner remains a danger to the public. It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public. [¶] Accordingly, when a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Lawrence, supra,* 44 Cal.4th at p. 1212.)

The *Lawrence* court discussed the appropriate weight to be given to the commitment offense. Thus, in evaluating the crime, "it is not the circumstance that the crime is particularly egregious that makes a prisoner unsuitable for parole—it is the implication concerning future dangerousness that derives from the prisoner having committed that crime." (*Lawrence, supra,* 44 Cal.4th at pp. 1213-1214.)

The *Lawrence* court went on to state, "although the Board and the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain

probative to the statutory determination of a continuing threat to public safety." (*Lawrence, supra,* 44 Cal.4th at p. 1214.) The court continued, "[a]bsent affirmative evidence of a change in the prisoner's demeanor and mental state, the circumstances of the commitment offense may continue to be probative of the prisoner's dangerousness for some time in the future. At some point, however, when there is affirmative evidence, based upon the prisoner's subsequent behavior and current mental state, that the prisoner, if released, would not currently be dangerous, his or her past offense may no longer realistically constitute a reliable or accurate indicator of the prisoner's current dangerousness." (*Id.* at p. 1219.)

The *Lawrence* court recognized that despite an egregious commitment offense, "it is evident that the Legislature considered the passage of time—and the attendant changes in a prisoner's maturity, understanding, and mental state—to be highly probative to the determination of current dangerousness." (*Lawrence*, *supra*, 44 Cal.4th at pp. 1219-1220.) Finally, the *Lawrence* court concluded: "In sum, the Board or the Governor may base a denial-of-parole decision upon the circumstances of the offense, or upon other immutable facts such as an inmate's criminal history, but some evidence will support such reliance *only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety. [Citation.] Accordingly, the relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when consider in light of the full record before the Board or the Governor." (*Id.* at p. 1221.)

In applying this scope of review to the facts in *Lawrence*, *supra*, 44 Cal.4th 1181, the court concluded that, although the crime committed by the inmate was egregious, it rejected that other factors—prior poor psychological evaluations and being counseled eight times for misconduct such as being late to appointments—supported that the inmate

was currently dangerous. Accordingly, the *Lawrence* court concluded: "[E]ven as we acknowledge that some evidence in the record supports the Governor's conclusion regarding the gravity of the commitment offense, we conclude there does not exist some evidence supporting the conclusion that petitioner *continues* to pose a threat to public safety." (*Id*. at p. 1225.) "When, as here, all of the information in a postconviction record supports the determination that the inmate is rehabilitated and no longer poses a danger to public safety, and the Governor has neither disputed the petitioner's rehabilitative gains nor, importantly, related the commitment offense to current circumstances or suggested that any further rehabilitation might change the ultimate decision that petitioner remains a danger, mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability." (*Id.* at pp. 1226-1227.)

In a companion case, the Supreme Court applied the scope of review set forth in *Lawrence.* In this companion case, the inmate had a long history of domestic violence and eventually shot and killed his second wife. The other factors of unsuitability and suitability were that the inmate had (1) a long criminal history (but the instant offense had resulted in his first felony conviction), (2) severe substance abuse problems, (3) little contact with his family throughout his incarceration, (4) participated in self-help programs, (5) been discipline free throughout his incarceration, and (6) positive psychological examinations. The Board initially denied parole, citing to the callous nature of the crime and the fact that the inmate had a history of domestic violence. The superior court upheld the Board's ruling, but the Court of Appeal reversed the decision after finding that the Board had erred in concluding that the inmate was not suitable for parole. The Court of Appeal ordered a new parole hearing, the Board thereafter granted parole, but the Governor reversed the Board. After the Court of Appeal reversed the

Governor's decision, the Supreme Court granted review. (*Shaputis*, *supra*, 44 Cal.4th at pp. 1245-1251.)

The *Shaputis* court reiterated what it had held in *Lawrence*. The court stated: "[T]he proper articulation of the standard of review is whether there exists 'some evidence' that an inmate poses a current threat to public safety, rather than merely some evidence of the existence of a statutory unsuitability factor." (*Shaputis*, *supra*, 44 Cal.4th at p. 1254.) The *Shaputis* court explained the proper scope of review as follows. "When a court reviews the record for some evidence supporting the Governor's conclusion that a petitioner currently poses an unreasonable risk to public safety, it will affirm the Governor's interpretation of the evidence so long as that interpretation is reasonable and reflects due consideration of all relevant statutory factors." (*Id.* at p. 1258.) In applying that standard to the facts in *Shaputis*, the court concluded that the inmate was not suitable for parole due to both the aggravated circumstances of the commitment offense, and " 'his lack of insight into the murder and the abuse of his wife and family.' " (*Id.* at pp. 1255, 1259-1260.)

When a superior court grants relief on a petition for writ of habeas corpus without an evidentiary hearing, as happened here, the question presented on appeal is a question of law, which the appellate court reviews de novo. (*In re Zepeda* (2006) 141 Cal.App.4th 1493, 1497; *In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 677 [if the trial court grants relief on a petition for writ of habeas corpus challenging a denial of parole based solely upon documentary evidence a reviewing court independently reviews the record].)

Background

The Life Crime[4]

" ' On the morning of August 23rd, 1989, at approximately 2 a.m., officers of the Gilroy Police Department responded to 495 Adams Court in Gilroy, California to investigate a possible shooting. The investigating officers were met by relatives who indicated that Haro and the 49-year-old victim, Maria Benavides . . . had been shot with a handgun and were in the residence. The officers observed the victim to have several bullet wounds in the abdomen and Haro a bullet wound to the chest area. As the victim was being transported to the hospital, she stated to the investigating officer "My husband tried to kill me." The victim further stated that her husband had shot her as he was jealous. Haro stated to investigating officers that he shot his wife "because she does not love me. She loves another." Both Haro and the victim were transported to San Jose Hospital via helicopter, where the victim succumbed 24 hours later. Subsequent investigation, including testimony from various family members, indicated Haro and [the] victim had been experiencing marital difficulties for at least the past six months. The victim had mentioned getting a divorce and Haro, on several occasions, had made statements that he might do something he might regret. Family members had heard Haro return home on the evening in question and go to the victim's bedroom where he engaged her in a conversation. A short time later, a number of shots were heard with a long pause and then a final shot being fired.' "[5]

---

[4] The summary of the commitment offense is taken from the record of Haro's February 2008 parole hearing. In turn, this summary appears to be taken from the probation officer's report in this case.

[5] According to the probation officer's report prepared after Haro's court trial, during the course of the investigation of the crime, investigating officers were presented with a letter written by the victim in which she indicated Haro had threatened her life and should he carry out his threat she wished for him to be punished to the full extent of the law. The letter was dated May 5, 1985.

The Hearing

A member of the Board read the summary of the commitment offense into the record. The Board reviewed Haro's prior criminal record, which consisted of a driving under the influence conviction that occurred in January 1977, and a petty theft conviction that occurred in February 1977. Then, the Board reviewed Haro's parole plans and letters of support, which included several offers from family members and friends in Mexico and the United States to provide support and housing for Haro. Haro indicated that he expected to be returned to Mexico. The Board noted that employment was not an issue because of Haro's "permanent disability." The Board expressed concern over Haro's immigration status, but confirmed that the Board would "get that issue resolved one way or the other."

The Board indicated that notices of Haro's parole hearing had been sent pursuant to Penal Code section 3402 to the individuals and agencies that were involved in the underlying case.[6] The Board noted that in response, the Santa Clara County District Attorney's office had sent a representative to the hearing. The Board had received a letter from the Gilroy Police Department opposing Haro's parole to Gilroy based on the violence of the crime and Haro's "lengthy criminal history and numerous negative

---

[6] Penal Code section 3042 provides: "(a) At least 30 days before the Board of Prison Terms [now Board of Parole Hearings] meets to review or consider the parole suitability or the setting of a parole date for any prisoner sentenced to a life sentence, the board shall send written notice thereof to each of the following persons: the judge of the superior court before whom the prisoner was tried and convicted, the attorney who represented the defendant at trial, the district attorney of the county in which the offense was committed, the law enforcement agency that investigated the case, and where the prisoner was convicted of the murder of a peace officer, the law enforcement agency which had employed that peace officer at the time of the murder."

contacts" with the police department. According to the Board, the letter went on to state that Haro was not amenable to change and posed a danger to the community.[7]

The Board noted that Santa Clara County Deputy District Attorney "Ron Rico" had sent a letter to the Board in which he had included copies of the autopsy report, death certificate, the May 5, 1985 letter from Haro's wife, and four pages from the diary of Mary Haro that indicated that her father had tried to stab her mother on February 22, 1989.

The Board considered Haro's behavior in prison, noting that Haro's counselor reported that Haro is physically disabled due to the self-inflicted gunshot wound he sustained during the commission of the murder of his wife. Haro is partially paralyzed in his lower body and was issued a wheelchair to facilitate his mobility in prison. Haro's counselor indicated that Haro had participated in Alcoholics Anonymous (AA). The Board observed that Haro had "fairly constant involvement in AA."

The Board asked Haro about the 12-step program. Specifically, Haro was asked to explain the eighth step. Haro gave a correct reply, but then could not remember the fourth step, but could remember the first step. The Board observed that Haro had not had any serious "disciplinaries" since 1995, but went on to note that Haro had only two discipline reports, a "115" for having contraband and a "128A" for abuse of the appeals process.

The Board reviewed Haro's October 3, 2007 psychological report. The report indicated that Dr. Hitchcock utilized a Spanish-speaking translator during the interview. According to the Board, in response to a previous Board's concern for Haro's future violence potential, and the extent to which Haro had explored the commitment offense

---

[7] Haro's counsel tried to correct the record by stating that Haro did not have a lengthy criminal history nor did he have numerous contacts with the Gilroy Police Department. The Board noted that it was only going to rely on Haro's convictions, which were in the record.

and come to terms with the underlying causes, Dr. Hitchcock reported that Haro had no psychological or psychiatric problems. In fact, Dr. Hitchcock's report noted that overall "risk assessment estimates suggest that the inmate poses a ***low*** likelihood to become involved in a violent offense if released to the free community." As a caveat, however, Dr. Hitchcock noted that the assessment was based partially on the likelihood that Haro abstain from substance abuse.

The Board noted that Dr. Hitchcock's report stated that Haro denied having an alcohol problem and did not intend to participate in AA when released on parole. The Board noted that although there was no indication that Haro had partaken of any alcohol or drugs while in prison, alcohol and drugs had played a "significant factor in the commitment offense and, in fact, according to some reporting, obliterated [Haro's] ability to recall the circumstances."

A Santa Clara County deputy district attorney was allowed to question Haro concerning a statement made by Dr. Hitchcock in his 2007 report. The doctor had written that Haro had "a superficial understanding of the underlying dynamics related to the violence that occurred in the crime . . . ."[8] The deputy district attorney asked Haro if he agreed with this statement. Haro confirmed that he did. The deputy district attorney opposed parole, stating that Haro had only a superficial understanding of what he did and why he did it. Two of Haro's daughters were allowed to speak and opposed Haro's parole.

After deliberating, the Board concluded that Haro was not suitable for parole and would pose an unreasonable risk of danger to society or a threat to public safety if released from prison. The Board stated that it had "considered many factors." The Board noted the gravity of the commitment offense. Specifically, the Board noted that its

---

[8] Dr. Hitchcock went on to state, "it is unlikely that a requirement for further exploration of the instant offense will produce more significant behavior changes of a positive or prosocial in nature in the future."

conclusion was that the offense "was carried out in an especially cruel and callous manner, in that on August 23rd, 1989, the victim, Maria Benavides Haro, who was 49 years of age at the time - - Miss Haro was your wife and mother of your children. She was shot in her bedroom in the early morning hours and died as a result of the wounds that she sustained. The Panel noted that the offense was carried out in a very dispassionate and calculated manner in that you went to the victim's home under the influence of alcohol and prescription drugs, to the extent that you had no recollection of the offense as indicated in your comments today and this occurred while you were armed with a .38 caliber semi-automatic. And, again, the early morning hours, this occurred in the victim's bedroom. The motive for this crime is certainly trivial in considering the magnitude and the extent of the loss that was sustained. It appears from the record that jealousy was the motive. And the ongoing jealousy escalated to the point where [Haro] used the ultimate violent act against a human being."

The Board stated that it was "mindful of recent court cases indicating that relying solely on the commitment [offense] over time has less significance," but noted that this was only Haro's "second subsequent hearing." The Board expressed concern that although Haro had attended AA programs, whether he comprehended and understood the 12 steps "was certainly not demonstrated today." The Board observed that Dr. Hitchcock's 2007 psychological report was "to a certain degree, contradictory in that although the doctor assigns a low likelihood of potential for violence in the future or recidivism . . . he concludes with a significant statement that tends to support certain elements of the unpredictability of [Haro's] behavior. And that is the comment with respect to [Haro's] superficial understanding of the underlying dynamics related to the violence that occurred in the crime. . . . at least in the mind of this Panel, it does leave the feeling of a certain degree of unpredictability."

Discussion

The Board's decision identified an immutable factor, the commitment crime, but failed to relate the identified immutable factor to circumstances that would make them probative of Haro's current dangerousness. (See *Shaputis*, *supra*, 44 Cal.4th at p. 1260 [decision must reflect "*due consideration of specified factors* as applied to the individual prisoner in accordance with applicable legal standards"].) "[T]he aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness . . . ." (*Lawrence*, *supra*, 44 Cal.4th at p. 1214.) "[M]ere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability." (*Id*. at p. 1227.) Immutable facts, such as the circumstances of the commitment offense, may be relied upon but must be related to the ultimate determination of current dangerousness. (See *id.* at p. 1221.) " '[D]ue consideration' of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness." (*Id*. at p. 1210.)

It is important to note that the Board rendered the decision in this case before *Lawrence* and *Shaputis* were decided. Nevertheless, the Board argues that there is some evidence supporting its decision that Haro poses an unreasonable risk of danger to society if released from prison. The Board argues that the evidence of Haro's insufficient self-help programming, his inconclusive psychological report, and his unclear immigration status and lack of parole plans provide some evidence to support the Board's decision.[9]

---

[9] Haro points out that the Board did not find that his programming was "insufficient"; his psychological report was not inconclusive; and as to his immigration and parole plans the Board suggested no barrier to his wish to return to his home in Mexico.

Citing *In re Singler* (2008) 169 Cal.App.4th 1227, 1244, (*Singler*) Haro argues that because there is no evidence in the record demonstrating that he poses an unreasonable risk of danger to society if released from prison, this court should order the Board to proceed to the next step of determining his prison term and effectuating the resulting parole date.

However, this case is in a different posture to *Singler*.[10] Here we are reviewing the propriety of the superior court's order granting Haro a new parole hearing.

Here, on appeal the Board does not articulate any reasoning establishing a rational nexus between the factors it cites to support the denial of parole and the necessary basis for the ultimate decision that, *currently*, Haro is dangerous. Moreover, as noted, Haro's hearing was conducted before *Lawrence* and *Shaputis* were decided. Accordingly, in fairness to the Board, we must give it the opportunity to lawfully exercise its discretion over Haro's parole application.

---

[10] In *Singler*, the inmate had brought a petition for writ of habeas corpus to the Third District Court of Appeal, which had summarily denied it. The California Supreme Court granted the inmate's petition for review and transferred the matter to the appellate court, with directions to vacate the denial of the petition and to order the Board to show cause why it did not abuse its discretion and violate due process in finding the inmate unsuitable for parole. On March 26, 2008, the appellate court held that the Board's decision finding the inmate unsuitable for parole was not supported by the evidence presented at the time of the hearing. On July 9, 2008, the California Supreme Court again granted review, but deferred further action on the case pending its consideration and disposition of a related issue in *Lawrence* and *Shaputis*. On October 28, 2008, the Supreme Court transferred the matter back to appellate court with directions to vacate the decision and to reconsider the case in light of its decisions in *Lawrence* and *Shaputis.* On remand, the appellate court again concluded that the Board's decision finding the inmate unsuitable for parole was not supported by the evidence presented at the time of the hearing. Thus, the court again granted the inmate's petition for writ of habeas corpus and ordered the Board to find the inmate suitable for parole, unless *new evidence* of his conduct and/or change in mental state subsequent to the 2006 parole hearing was introduced and sufficient to support a finding that the inmate currently posed an unreasonable risk of danger to society if released on parole. (*Singler*, *supra*, 169 Cal.App.4th. at pp. 1230-1231, 1245.)

As discussed at length in *Lawrence* and *Shaputis*, the nature of Haro's commitment offense was a valid basis for denying parole only if there was no affirmative evidence of a change in Haro's demeanor and mental state since the time of the offense. The Board here was obligated to weigh the commitment offense, and other factors that it considered, against factors tending to show suitability for parole (see § 2402, subd. (c))—to determine whether, on balance, *currently*, Haro poses an unreasonable risk of danger if released on parole.

We reiterate, " 'due consideration' of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision—the determination of current dangerousness." (*Lawrence*, *supra*, 44 Cal.4th. at p. 1210.) This is what due process requires. (*Lawrence, supra,* 44 Cal.4th at p. 1212; *Board of Parole Hearings v. Superior Court* (*Portee*) (2008) 170 Cal.App.4th 104, 112, fn. 10.)

Disposition

The trial court's order that directs the Board to conduct a new parole suitability hearing and to proceed in accordance with due process is modified to direct the Board to reconsider Haro's parole suitability in light of *In re Lawrence, supra,* 44 Cal.4th 1181 and *In re Shaputis, supra,* 44 Cal.4th 1241. Further, the order is modified to omit all restrictions upon the Board's full exercise of its discretion under law. As so modified, the order is affirmed. The court is directed to forward a copy of the order as modified to the Board.

_____

ELIA, J.

WE CONCUR:

_____

RUSHING, P. J.

_____

PREMO, J.